

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER VAINO LAKE,

Defendant-Appellant.

UNPUBLISHED
November 6, 2008

No. 280436
Arenac Circuit Court
LC No. 07-003220-FH

Before: O’Connell, P.J., and Smolenski and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of fourth-degree criminal sexual conduct, MCL 750.520e, for which he was sentenced to concurrent terms of five years’ probation with three months in jail. Defendant was acquitted of three additional criminal sexual conduct charges. We affirm. This case has been decided without oral argument under MCR 7.214(E).

First, defendant argues that the trial court erred when it ruled that defendant’s counsel could not continue his inquiry regarding the remainder of defendant’s statement to Officer Christopher Jamie. We review a trial court’s decision to admit or exclude evidence for an abuse of discretion. *People v Hendon*, 246 Mich App 371, 406; 633 NW2d 376 (2001). An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The prosecution offered defendant’s statement that “he was at the apartment already described with [the complainant] and . . . [a]t one point him and [the complainant] were on the fold-out couch in the living room[, a]nd that him and [the complainant] ended up making out or kissing at some point during the night[, a]nd that [the complainant] didn’t have a shirt on” as evidence against him. This statement is admissible pursuant to MRE 801(d)(2)(A), which states that an admission by a party offered against that party is not hearsay. This portion of defendant’s statement is also admissible under MRE 804(b)(3), which allows the admission of statements that are “so far contrary to the declarant’s pecuniary or proprietary interest . . . that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.”

However, on cross-examination, defense counsel attempted to introduce Officer Jamie’s testimony regarding the rest of defendant’s statement, which indicated that the complainant did

not perform oral sexual acts on defendant. Although the trial court concluded that the rest of defendant's statement constituted hearsay and therefore was inadmissible, defendant argues that the trial court should have admitted testimony regarding the excluded portion of the statements under the "rule of completeness." Defendant's argument that he should have been permitted to introduce the remainder of the statement presents a close question, but we need not address this question because, instead, we conclude that any potential error resulting from the trial court's failure to admit the entire statement was harmless.

Although defendant denied that he engaged in oral sexual acts with the complainant, he admitted "making out" with her while she was not wearing a shirt. The prosecutor acknowledged defendant's denial in her opening and closing statements, and Officer Jamie testified that defendant denied being naked with the victim and denied performing oral sex on the victim. The trial court's failure to admit defendant's entire statement did not play a role in the jury's verdict convicting defendant of two counts of fourth degree criminal sexual contact, and therefore defendant has failed to demonstrate outcome-determinative error.

Next, defendant argues that the prosecutor improperly commented on his decision to not testify at trial. We disagree.

The Fifth Amendment guarantees that a person who exercises the right to remain silent will not have that silence used against him." *People v Cade*, 125 Mich App 196, 198; 335 NW2d 653 (1983). As a result, a prosecutor is generally prohibited from commenting about the defendant's failure to take the stand. See, e.g., *People v Mancill*, 393 Mich 132, 132; 223 NW2d 289 (1974).

However, a "fair comment [made by the prosecutor] does not violate the Fifth Amendment, even where the defendant does not take the stand." *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995). The *Fields* Court noted that in *United States v Robinson*, 485 US 25, 29; 108 S Ct 864; 99 L Ed 2d 23 (1988), the defendant did not testify at trial, but the defendant's attorney then argued during his closing statement that the prosecution did not allow the defendant to explain his side of the story. *Fields, supra* at 110. In his rebuttal, the prosecutor told the jury that the defendant "could have taken the stand and explained it to you." *Id.*, quoting *Robinson, supra* at 29. The *Robinson* Court concluded that the prosecutor's statement was a fair response to the defense attorney's comment, and noted that a determination regarding whether a comment by the prosecutor mentioning defendant's silence violated defendant's Fifth Amendment rights "must be taken in light of the facts of that case." *Fields, supra* at 110–111, citing *Robinson, supra* at 33–34. The *Robinson* Court then concluded that the right to remain silent does not "prohibit the prosecutor from fairly responding to an argument of the defendant by advert[ing] to that silence." *Fields, supra* at 111, citing *Robinson, supra* at 34.

In this case, the prosecutor's comment was fair and did not violate defendant's Fifth Amendment rights. At trial, defendant's attorney attempted to introduce testimony regarding defendant's entire statement to Officer Jamie. When the prosecutor challenged the evidence as hearsay, defendant's attorney explained that he believed the jury was "entitled to know the entire statement." In response, the prosecutor said, "[I]f his client would like to take the stand and testify, then he absolutely has the right to do that." The prosecutor fairly identified the only manner in which defendant's testimony could be admitted, which was by defendant taking the stand. Even assuming the prosecutor's statement was a direct comment on defendant's failure to

take the stand, the comment did not deprive defendant of his right to a fair trial because the prosecutor's comment was simply a fair response to a statement made by defendant's attorney. Further, although this statement was made in the presence of the jury, the prosecutor's remark was directed to the trial judge in considering an evidentiary objection, not as an argument to the jury.

Regardless, even if an error occurred, it was harmless. In his statement to Officer Jamie, defendant admitted that he was with the complainant on the fold-out couch in the apartment, and that they were "making out" and kissing when she was not wearing a shirt. Although defendant was charged with five counts of criminal sexual conduct, he was only found guilty of intentionally touching the complainant for a sexual purpose, and he had effectively admitted to this behavior in admissible portions of his statement.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Elizabeth L. Gleicher